

THIS DISPOSITION IS NOT  
CITABLE AS PRECEDENT OF THE TTAB      FEB. 23, 99  
U.S. DEPARTMENT OF COMMERCE  
PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re American Power Conversion Corporation

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Serial No. 74/525,973

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Stephen J. Holmes of Salter & Michaelson for American Power  
Conversion Corporation

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Before Hanak, Quinn and Bucher, Administrative Trademark  
Judges.

Opinion by Hanak, Administrative Trademark Judge:

American Power Conversion Corporation (applicant)  
seeks registration of POWERMANAGER in typed drawing form  
for "power protection devices for use with computers and  
other sensitive electronic equipment." The application was  
filed on May 17, 1994 with a claimed first use date of May  
1994.

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The Examining Attorney refused registration pursuant to Section 2(d) of the Lanham Trademark Act on the basis that applicant's mark, as applied to applicant's goods, is likely to cause confusion with the identical mark POWERMANAGER, previously registered in typed drawing form for "computer programs recorded on magnetic diskettes and instruction manuals therefor sold as a unit." Registration No. 1,419,821 issued December 9, 1986 with a claimed first use date of March 1985.

When the refusal was made final, applicant appealed to this Board. Applicant and the Examining Attorney filed briefs. Applicant did not request a hearing.

In any likelihood of confusion analysis, two key considerations are the similarity of the marks and the similarity of the goods. Federated Foods, Inc. v. Fort Howard Paper Co., 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)("The fundamental inquiry mandated by Section 2(d) goes to cumulative effect of differences in the essential characteristics of the goods and differences in the marks.")

In this case, the marks are absolutely identical. The fact the marks are identical "weights heavily against

applicant." In re Martin's Famous Pastry Shoppe, Inc., 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984). Indeed, the fact that applicant has selected a mark identical to registrant's mark "weights [so] heavily against the applicant" that applicant's use of the mark on "goods ... [which] are not competitive or intrinsically related [to registrant's goods] ... can [still] lead to the assumption that there is a common source." In re Shell Oil Co., 992 F.2d 1204, 26 USPQ2d 1687, 1688-89 (Fed. Cir. 1993).

Turning next to a consideration of the goods, while they need not be intrinsically related for a finding of likelihood of confusion, we find that in point of fact, applicant's goods and registrant's goods are clearly related. Under such circumstances, there is not a mere likelihood of confusion, but a strong likelihood of confusion.

To elaborate somewhat, both registrant's computer programs and applicant's power protection devices are used specifically in conjunction with computers. Moreover, as described in the application and the registration, applicant's goods and registrant's goods travel in the same trade channels and are purchased by the same end users. In

this regard, we note that in a paper dated May 16, 1995, applicant stated as follows at page 3: "The applicant's goods are widely distributed through various retail channels, such as retail computer stores, and the end purchasers of their [applicant's] products are primarily individuals or businesses which own computer systems or other sensitive electronic equipment." Obviously, registrant's goods (computer programs and manuals) can be sold in retail computer stores to the same end users, namely, individuals or businesses which own computer systems.

Applicant argues that the channels of trade and end users of its goods and registrant's goods are different because "applicant did obtain some second-hand information that the [registered] mark was being used on a special power monitoring program used by utilities. However, such information could not be verified." (Applicant's brief page 2). There are two problems with applicant's argument. First, as applicant concedes, there is absolutely no evidence in the record demonstrating that registrant's computer programs are used only by utilities. Second, in deciding the issue of likelihood of confusion, we must compare applicant's goods as described in the application with registrant's goods as described in the registration.

As described in the registration, registrant's computer programs are not limited in terms of trade channels or end users or purchasers.

Applicant also makes the argument on page 4 of its brief that "the end consumers of computer products tend to be highly educated persons" and thus there is less likelihood of confusion. There are two problems with applicant's argument. First, not only does applicant's argument lack any evidentiary support, but in 1999, it flies in the face of common sense to even argue that most end users of computer products tend to be highly educated persons. Second, even if the end users of computer products were always highly educated, there would still be a likelihood of confusion when, as is the case here, the marks are absolutely identical.

Finally, we note that at page 4 of its brief applicant argues that "applicant and registrant have been concurrently using the marks for over three years without any apparent instances of actual confusion." Applicant fails to provide any evidence to support this contention. Moreover, given the fact that the marks are identical, it is most unlikely that purchasers of registrant's goods and applicant's goods would ever even learn of their confusion.

In any event, proof of actual confusion is certainly not a prerequisite to a finding of likelihood of confusion.

Decision: The refusal to register is affirmed.

E. W. Hanak

T. J. Quinn

D. E. Bucher  
Administrative Trademark  
Judges, Trademark Trial  
and Appeal Board

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